

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

JAMES W. DEATON,

Plaintiff,

v.

NO. 1:98CV312-S-D

UNITED STATES OF AMERICA,

Defendant.

OPINION

This case was originally filed in the Circuit Court of Oktibbeha County, Mississippi, charging James D. May and Thomas J. Army with defamation, “malicious conspiracy,” “motive concealment,” and deliberate infliction of emotional distress in connection with “inaccurate performance ratings” and a memorandum suggesting that plaintiff was a threat to the safety of his fellow employees with the United States Department of Agriculture. Subsequently, the United States Attorney for the Northern District of Mississippi certified, pursuant to the Westfall Act, that at the time of the incidents in question, both May and Army were acting within the course and scope of their employment as employees of the Department of Agriculture. This scope of employment certification resulted in the substitution of the United States of America as the defendant and the removal of this action to this court.

Presently before the court is plaintiff’s motion to remand and defendant’s motion to dismiss. The court turns first to the motion to remand. When a federal employee is sued for a wrongful or negligent act, the Federal Employees Liability Reform and Tort Compensation Act of 1988 (the

“Westfall Act”) empowers the United States Attorney General, through the appropriate United States Attorney, to certify that the employee “was acting within the scope of [her]...employment at the time of the incident out of which the claim arose.” *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 419 (1995) (quoting 28 U.S.C. § 2679(d)(1)). Where the action is brought in state court and scope of employment is certified, the action is removed, the employee is dismissed from the suit, and the United States is substituted as the defendant. *Id.*; see *Garcia v. United States*, 88 F.3d 318, 322 (5th Cir. 1996). Even if the certification is challenged and rejected, “the action nevertheless remains in district court.” *Garcia*, 88 F.3d at 324, 327. Plaintiff’s motion to remand is therefore denied.

The court turns now to defendant’s motion to dismiss which is premised on alternative grounds. First, defendant argues that plaintiff’s claims are barred because they fall within the Civil Service Reform Act (CSRA), Title 5, which is the exclusive remedy for claims involving personnel decisions of federal employees. Alternatively, defendant maintains that plaintiff’s claims are barred under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2672-2680, for failure to exhaust administrative remedies. In response, plaintiff denies the applicability of the CSRA or the FTCA because the actions of May and Army were, in his view, intentional wrongdoings, and he also challenges the certification that these men were acting within the course and scope of their employment at the time of the incidents in question.

The court begins with the certification issue. “Ordinarily, scope-of-employment certifications occasion no contest.” *Lamagno*, 515 U.S. at 421. However, when they do, they are clearly reviewable by the court. *Rodriguez v. Sarabyn*, 129 F.3d 760, 764 (5th Cir. 1997). When a plaintiff raises a certification challenge, the “burden of proof lies with him to show that the...initial decision was incorrect.” *Palmer v. Flaggman*, 93 F.3d 196, 198 (5th Cir. 1996). In this case,

plaintiff's only evidence that May and Army were not acting within the scope of their employment with the Department of Agriculture when plaintiff's job performance was reviewed and the subject memorandum issued is his bald assertion that the certifying person, Edward B. Knipling, committed perjury in making the certification. This is clearly insufficient to show that the employment certification was in error, and the court, therefore, turns to defendant's arguments for dismissal.

The CSRA provides the "comprehensive and exclusive procedures for settling work-related controversies between federal civil-service employees and the federal government." *Rollins v. Marsh*, 937 F.2d 134, 139 (5th Cir. 1991). Personnel actions covered by the CSRA include disciplinary or corrective action, reassignments, and performance evaluations. 5 U.S.C. § 2302(a)(2)(A). Thus, if the alleged acts are personnel decisions arising out of plaintiff's employment with the federal government or if the claims for damages are consequences incident to those personnel decisions, the CSRA provides plaintiff's exclusive remedy and precludes the instant suit. *Morales v. Department of Army*, 947 F.2d 766, 768-69 (5th Cir. 1991); *Rollins*, 937 F.2d at 139-140 ("The remedies available...under the CSRA preclude recovery under the FTCA").

Having carefully considered the matter, the court finds that plaintiff's exclusive remedy lies under the CSRA. Though couched in terms of intentional wrongdoing on the part of May and Army, plaintiff's allegations clearly arise out of his employment relationship with the federal government. To the extent, however, that the claims arguably do not arise out of that relationship, plaintiff's claims fail under the FTCA. Though plaintiff disputes the applicability of the FTCA to this case, his arguments are unpersuasive, as he is clearly suing for "wrongful act[s]...of...employee[s] of the Government...." 28 U.S.C. § 2679(b)(1). Thus, before filing suit under the FTCA, a plaintiff must present his administrative claim in writing with the appropriate federal agency within two years after

the claim accrues. *See* 28 U.S.C. §§ 2401(b) and 2675(a). Plaintiff has come forward with no evidence that he submitted an administrative claim with the Department of Agriculture within the statutory time period regarding the issues at bar. As such, the prerequisites for filing this suit have not been met, and thus, plaintiff's claims of tortious wrongdoing are not properly before the court. *Cf. Perez v. United States*, 167 F.3d 913 (5th Cir. 1999). Defendant's motion to dismiss is therefore granted.

An appropriate order shall issue.

This _____ day of _____, 1999.

SENIOR JUDGE